



As to the first contention, the court directed the FDO to screen such motion.<sup>1</sup> After conducting such screening, the FDO filed a “Notice of Ineligibility for Simmons Relief” (#11). The salient determination by the FDO was that petitioner could not viably assert any claim for relief under Simmons because the underlying state court felony conviction occurred in 1992. Simmons has no impact on federal convictions premised or enhanced by a North Carolina conviction that either predates or postdates the effective dates of North Carolina’s Structured Sentencing Act (October 1, 1994 to December 1, 2011). It appearing that petitioner’s conviction occurred in 1992, no relief is available to him under Simmons.

## **ORDER**

**IT IS, THEREFORE, ORDERED** that petitioner’s Motion to Vacate, Set Aside, or Correct a Sentence (#1) is **DISMISSED** upon preliminary review in accordance with Rule 4(b) as petitioner does not state a viable claim for relief.

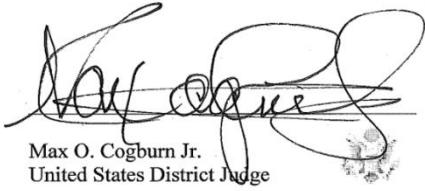
### **Denial of Certificate of Appealability**

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, this court declines to issue a certificate of appealability as petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller -El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484–85 (2000) (in order to satisfy § 2253(c) when court denies relief on procedural grounds, a petitioner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right).

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<sup>1</sup> Petitioner is advised that the FDO is not counsel of record. The FDO only becomes counsel of record if it is determined that a potentially meritorious claim has been or could be asserted.

Signed: December 11, 2012



Max O. Cogburn Jr.  
United States District Judge